OPINION NO. 93-08
July 2, 1993

FACTS:

An attorney employed by the Arizona Attorney General's Office has inquired about the ethical propriety of attorneys employed by that office participating in the Maricopa County Bar Association's Volunteer Lawyers Program ("Vol Law"). The inquiring attorney indicates that the State of Arizona, its agencies, and the Attorney General's office are frequently involved in litigation involving citizens, including indigents, in areas such as tax collection, fraudulent claims for health care, financial assistance disputes, child support enforcement, occupational licensing, contracts, employment, civil claims against the State, and criminal law enforcement. All disputes with the State and its many agencies do not necessarily appear in the Attorney General's records. For example, criminal cases involving informants are often recorded under fictitious names. Other agencies' investigative matters do not appear in the Office's records. Moreover, in certain cases, the Attorney General's office seeks civil remedies on behalf of a class of citizens; recovery is sought for the group as a whole, and the names of all of the prospective claimants or beneficiaries are not always known.

According to the inquiring attorney, Vol Law has suggested that assistant attorneys general help staff an Intake Clinic, where attorneys would meet with prospective clients at Vol Law's offices. During the intake process, an attorney meets with a potential client to discuss the facts of the case and to review supporting documentation. The attorney tells the potential client that his or her case has not been accepted, and that the interview is only for the purpose of gathering information to see whether Vol Law will accept the case. Potential clients are screened by type of case and for financial eligibility. The attorney may give brief practical advice about preserving rights and self-help measures that can be taken until a decision is made regarding acceptance into the Vol Law program.

Immediately after the meeting, the attorney prepares an Intake Memorandum summarizing the relevant facts and documents. The attorney includes any additional information he or she believes to be important in evaluating the case, including the client's demeanor, a general description of legal theories available, and practical or legal problems associated with the case. Vol Law's Board meets weekly to review the Intake Memoranda and accept, reject, or request further information about each case.

Individual attorneys in the Attorney General's Office would like to staff a weekly Intake Clinic and, when appropriate, to represent pro bono clients who have been accepted into the Program. Vol Law would provide the Attorney General's Office with a list of potential clients twenty-four hours in advance so that the Attorney General's Office could eliminate those who are named

in active cases on which that office is working. However, as a practical matter, the Attorney General's Office does not have the ability to eliminate all persons who are or have been engaged in disputes or claims against the State, or who are or have been witnesses or victims in cases handled by the State.

QUESTIONS:

1. May attorneys employed by the Attorney General's Office ethically participate in the Vol Law Program?

2. May attorneys employed by the Attorney General's Office ethically represent clients referred to them by Vol Law?

ETHICAL RULES INVOLVED:

ER 1.6. Confidentiality of Information

ER 1.7. Conflict of Interest: General Rule

ER 6.1. Voluntary Pro Bono Publico Service

OPINION:

This inquiry arises out of a recent amendment to A.R.S. § 41-191, authorizing assistant attorneys general to represent private clients in pro bono matters. See A.R.S. § 41-191(B)(2)(a-k). The statute imposes several restrictions, including the requirement that the pro bono representation must "not appear to create a conflict of interest." A.R.S. § 41-191(B)(2)(e). Although this committee is not empowered to interpret statutory provisions or to give legal advice, it may offer an opinion regarding the ethical propriety of proposed conduct. See State Bar of Arizona Committee on Rules of Professional Conduct, Statement of Jurisdictional Policies, §6. This opinion addresses the ethical propriety of assistant attorneys general participating in the Vol Law Intake Program and representing clients referred by that Program.

ER 6.1 recognizes the basic responsibility of every lawyer to provide legal services for those who are unable to pay for them. See Comment to ER 6.1. ER 6.1 does not create a mandatory duty, but suggests that a lawyer dedicate a minimum of fifty hours per year to public interest legal service. The recent amendments to A.R.S.§ 41-191, as well as similar amendments to A.R.S. § 11-583 and A.R.S. § 11-403 (providing that deputy county public defenders and deputy county attorneys may participate in pro bono programs), evidence the legislative intent that government attorneys be permitted to perform pro bono services.[1]

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[1] The American Bar Association has recognized the need for greater involvement by government attorneys in pro bono services. See generally American Bar Association, Private Bar

Although a number of states have implemented programs permitting pro bono work by government attorneys,[2] it appears that there are no ethics opinions addressing the conflict of interest problems created by such representation.

The unique position of attorneys employed by the government suggests that a heightened level of scrutiny for possible conflicts of interest is warranted when those attorneys wish to engage simultaneously in the private practice of law, albeit on a pro bono basis. The need to dispel even the appearance of impropriety becomes "even more compelling when the attorney is a government attorney, i.e., an attorney invested with the public trust." See Perillo v. Advisory Committee on Professional Ethics, 83 N.J. 366, 416 A.2d 801, 809 (1980) (holding that attorneys general can ethically represent the state against state employees). As indicated by the inquiring attorney, the Attorney General's Office represents an extremely broad range of interests. Because the attorneys employed by that office must avoid even the appearance of a conflict of interest, they are ethically excluded from virtually every dispute in which the State of Arizona may have a stake. ER 1.7(a).[3] Likewise, an assistant

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Involvement: Info pack on Government Attorney Pro Bono Participation [hereinafter ABA Info Pack]. Others have also begun to encourage government attorneys to perform pro bono services. See, e.g. , Lerman, Public Service by Public Servants, 19 Hofstra L. Rev. 1141 (Summer 1991) [hereinafter Public Service].

[2] Only Arizona and a few other states have enacted statutes explicitly authorizing assistant attorneys general to render pro bono services. See e.g., N.D. Cent. Code § 27-14-02(4); Or. Rev. Stat. § 180.140(6); Wash. Rev. Code Ann. §43.10.130(2). However, many state laws prohibiting the private practice of law by government attorneys have been interpreted as permitting uncompensated pro bono services by such attorneys. See, e.g., Md. Atty. Gen. Op. No. 90-023, 1990 Md. AG LEXIS 25 (May 25, 1990) (Maryland statute prohibiting the private practice of law by government attorneys did not prohibit uncompensated civil pro bono activities).

[3] ER 1.7. Conflict of Interest: General Rule, provides that:

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) each client consents after consultation.

attorney general could not represent a pro bono client if the representation would be materially limited by the lawyer's responsibility to the State. ER 1.7(b). Given the unique problems posed by a government attorney performing pro bono work for a private citizen, stringent safeguards would seem to be warranted.[4]

The Offices of the Attorney General in some states have adopted internal policies and guidelines to govern the pro bono work done by their attorneys. See ABA Info Pack. These internal policies generally require that attorneys not accept clients involved in legal proceedings with the State or in which the interests of the State are or are likely to be involved. See, e.g., ABA Info Pack: Memorandum from Elizabeth M. Osenbaugh, Iowa Department of Justice, to All Attorneys (March 3, 1986). Some programs require that the government attorney submit a written request and/or receive written approval from a supervisor or a deputy attorney general before accepting a pro bono matter. See, e.g., ABA Info Pack: Memorandum from Office of the Attorney General, California Department of Justice, to All Attorneys (September 19, 1984); ABA Info Pack: Florida Attorney General's Pro Bono Policy. Many also require that attorneys general performing pro bono projects disclose to clients and to tribunals before which they appear that they are appearing as a volunteer in a pro

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(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

[4] The Arizona legislature has acknowledged the problems associated with identifying and avoiding conflicts of interest created by permitting government attorneys to take on pro bono projects. See Arizona State House of Representatives, Government Operations Committee Notes re: Senate Bill 1449 (April 7, 1992); Arizona State Senate, Judiciary Committee Notes Re: Senate Bill 1449 (March 9-10, 1992). However, neither house proposed actual guidelines or suggestions for avoiding such conflicts. At least some members of the legislature seemed to anticipate that cases would go through a review process before being assigned to an individual assistant attorney general for representation. See Arizona State House of Representatives, Government Operations Committee Notes re: Senate Bill 1449 (April 7, 1992) (statements of Mrs. Blake and Mr. Isaacson).

bono project and not in their official capacity. See, e.g., ABA Info Pack: Memorandum from Ronald W. Lorensen, Alaska Deputy Attorney General, to Staff Attorneys (December 7, 1982); ABA Info Pack: Florida Attorney General's Pro Bono Policy. Some offices permit their attorneys to participate in telephone advice projects on pre-determined subjects. See ABA Info Pack: Memorandum from Hubert H. Humphrey, III, Minnesota Attorney General, to All Attorneys (February 4, 1988). Others have concluded that the conflicts of interest created by assistant attorneys general representing pro bono clients were largely insurmountable, and have limited pro bono activities to legal training programs, community legal education and the like. See ABA Info Pack: State of Connecticut, Office of the Attorney General Policies on Pro Bono Service, Special Projects, Community Service, and Law-Related Education.

Maryland has a relatively sophisticated pro bono program for its assistant attorneys general. The Maryland Program has a Committee, chaired by a Deputy Attorney General, which serves as a liaison between pro bono organizations referring cases to the Attorney General's Office and the volunteer attorneys. ABA Info Pack: Maryland Policy Guidelines - Pro Bono Representation Program. The Committee helps volunteer attorneys with questions relating to conflicts of interest and provides procedural and substantive advice on issues that arise in connection with pro bono representation. Id. Maryland's Program limits representation by attorneys general to cases falling within designated subject areas, including: (1) domestic violence cases in which an order of protection is the only relief sought, (2) simple wills and powers of attorney, (3) landlord/tenant cases not involving the Consumer Protection Act, (4) AIDS-related cases not involving state institutions or public assistance, (5) simple divorces, (6) educational activities, (7) discrete research projects to assist attorneys who represent low income groups or individuals, and (8) Medicare appeals.

None of these states' ethics committees have addressed the propriety of a government employee participating in a program such as the Vol Law Intake Program. The inquiring attorney has expressed concern that the Attorney General's Office may not be able to determine adequately whether the State has a conflict of interest with either the potential client or other interested parties prior to interviewing the client at the Vol Law Intake Clinic. Generally, an attorney-client relationship must exist before a conflict of interest can arise. See Foulke v. Knuck, 162 Ariz. 517, 520, 748 P.2d 723, 726 (App. 1989). Whether an attorney-client relationship exists depends upon the nature of the work performed, the circumstances under which confidences are divulged, and "the client's belief that he is consulting a lawyer in that capacity and his manifested intention to seek professional legal advice." Id. In other words, whether an attorney-client relationship exists may depend upon the client's subjective belief. Matter of Petrie, 154 Ariz. 295, 300, 742 P.2d 796, 801 (1987).

Arguably, if properly conducted, the Intake meeting does not create an attorney-client relationship. See State Bar of Arizona, Committee on Rules of Professional Conduct, Opinion No. 91-24 (December 18, 1991) (finding that Volunteer Lawyers Program can ethically represent party adverse to person who participated in Intake Program but was ultimately not represented by Community Legal Services, an entity affiliated with the Vol Law Program). Forewarning potential clients that they have not yet been accepted as a client, and that any information they provide is being taken only to determine whether the person qualifies for aid, may prevent the client from forming a reasonable belief that an attorney-client relationship exists.

However, even if no formal attorney-client relationship has been created, the potential for a conflict of interest in the event that the interviewee reveals confidential information to the assistant attorney general remains. The lawyer has a duty to maintain confidential communications learned during an initial interview with a prospective client, even if no "actual" attorney-client relationship is ultimately formed. See 1 G. Hazard, Jr. & W. Hodes, The Law of Lawyering § 1.6:115 at p. 156 (1991 Supp.).

If attorneys employed by the Attorney General's Office are to participate in the Intake Program, certain safeguards will be necessary to minimize the risk of inadvertent disclosure of confidential information and the creation of conflicts of interest. To the extent possible, the Attorney General's Office should establish a procedure for pre-screening possible conflicts of interest with potential clients and their adverse parties prior to the initial interview.[5] Furthermore, participating attorneys should be limited to interviewing potential clients with problems in substantive areas in which the State is unlikely to have an interest. Examples of areas which may be permissible include domestic relations not involving minors, landlord/tenant, and simple wills. The Attorney General's Office is in the best posi-

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[5] This is no different than the practice currently followed by private law firms in Arizona whose lawyers participate in the Vol Law Program. In other words, certain basic information is provided to the lawyer by Vol Law at least twenty-four hours prior to the intake interview so that preliminary screening can be done to minimize the risk of a conflict of interest. The Attorney General's Office might want to prepare its own form to be completed by Vol Law and delivered to the Attorney General's Office in advance of an intake interview. The form would call for disclosure, for example, of any case in which the prospective client is involved as a party with the State of Arizona, any cases in which the prospective client is a witness for or against the State of Arizona, and any other information that is required in order to allow the Attorney General's Office to conduct a preliminary conflicts review.

tion to determine which areas of law would be least likely to create a conflict of interest for that office.[6]

If attorneys in the Attorney General's Office can effectively pre-screen potential clients for conflicts of interest and limit themselves to areas of the law that the Attorney General's Office determines to be unlikely to give rise to conflicts with the State, assistant attorneys general may be permitted not only to participate in the intake process but to represent clients referred to them by Vol Law. Of course, after the intake interview, any additional information obtained relating to possible conflicts will have to be checked against the Attorney General's conflicts database to confirm that no conflict exists. A standing in-house committee such as that formed in Maryland to deal with any conflicts of interest or other ethical concerns that arise should help minimize the risk of an inadvertent ethical violation.

As an additional precaution, when representing pro bono clients, government attorneys must also take care to avoid potential violations of ER 8.4(e), which prohibits a lawyer from suggesting or implying an ability to influence improperly a government agency or official. Because of the unique position held by government attorneys, they should make clear to their pro bono clients, to their adversaries, and to any tribunals before which they appear on behalf of such clients, that they are acting in an individual capacity and not on behalf of the State of Arizona.

It is therefore the committee's conclusion that, assuming the other requirements of A.R.S. 41-191(B)(2)(a)-(k) are satisfied, assistant attorneys general may ethically participate in the Vol Law Program if reasonable precautions, such as those suggested in this opinion, are taken to detect and avoid conflicts of interest.

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[6] Before assistant attorneys general participate in a pro bono program, guidelines addressing the practical issues raised by A.R.S. § 41-191 should also be established by the Attorney General's Office. These issues include: whether (and, if so, how) attorneys will obtain malpractice insurance for their pro bono activities; what resources, if any, the Attorney General's Office can and will make available for use on pro bono projects; and what arrangements can be made for use of leave and/or vacation time for hours spent on pro bono projects. Significant guidance on these issues can be found in materials referenced in this opinion. See Public Attorneys; ABA Info Pack.